No. 96-438

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

JOSEPH P. BOLTACH,

Petitioner,

v.

DEXTER TOWNSHIP,

Respondent.

ABRAHAM V. WILLIAMS, JR.,

Petitioner,

v.

DEXTER TOWNSHIP,

Respondent.

On Petition For A Writ Of Certiorari To The Michigan Court Of Appeals

RESPONDENT DEXTER TOWNSHIP'S BRIEF IN OPPOSITION TO PETITIONERS JOSEPH P. BOLTACH'S AND ABRAHAM V. WILLIAMS, JR.'S *PETITION FOR WRIT OF CERTIORARI*

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Did the Michigan Court of Appeals and the Michigan Supreme Court refuse to consider Petitioners' purported state and federal constitutional claims, and, if so, did this refusal deprive Petitioners "of their Fourteenth Amendment right to due process"?

2. Did Petitioners properly raise, in the Michigan appellate courts, their claim that they were deprived of their Fourteenth Amendment right to due process as a result of the Michigan appellate courts' alleged failure to consider Petitioners' constitutional claims, and, if not, is this claim properly before this Court?

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Respondent Dexter Township (the "Township") submits this Brief in Opposition to Petitioners Joseph P. Boltach's and Abraham V. Williams, Jr.'s Petition for Writ of Certiorari.

JURISDICTION

Petitioners are seeking to invoke the jurisdiction of this Court under two sections of the United States Constitution and 28 U.S.C. § 1257(a). However, Petitioners cannot properly invoke this Court's jurisdiction under any of those provisions. The two cited Sections of the United States Constitution do not provide this Court with jurisdiction over Petitioners' petition. Moreover, Petitioners cannot establish jurisdiction under 28 U.S.C. § 1257, because they have not shown that the Fourteenth Amendment due process claim which they are asserting in their Petition was properly "set up or claimed" in the prior state court proceedings.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

The provisions of the Michigan and United States Constitutions cited in Petitioners' Petition are not relevant to that Petition, with the exception of the portion of the Fourteenth Amendment to the United States Constitution providing that "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . " Rather, 28 U.S.C. § 1257(a) should be dispositive of the Petition before the Court. That statute provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of

a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

COUNTER-STATEMENT OF THE CASE

This case involves Petitioners' challenge to a special assessment which was enacted to finance a public sewer system. Petitioners own single-family and rental duplexes near Portage and Base Lakes in Dexter Township, Michigan. Each structure is served by an individual septic system and well. The age and poor condition of many of the area's septic fields, the area's population density, and the area's soil conditions and hydrology have resulted in persistent sanitation problems, frequent unavailability of potable well water at nearby homes, and the contamination of the lakes, groundwater, and wells. Many homes were previously unsuitable for normal household activities or for year-round use due to the severity of the septic problems. In response to this crisis, Dexter Township joined together with other area townships to create a Water and Sewer Authority and to establish a special assessment district to finance a public sewer system.

Petitioners petitioned the Michigan Tax Tribunal ("MTT") for relief from the assessment. Following six days of hearings, the MTT hearing officer found that properties with detached homes were specially benefited and that the properties' value enhancement was reasonably proportionate to the amount levied. As to the duplexes, the hearing officer found that Petitioners had

failed to provide reliable or credible evidence overcoming the presumption that the assessment was in the proper amount and was otherwise valid, and that the evidence supported a finding that the duplex properties were enhanced in the amount levied.

Petitioners' properties are part of a very densely developed shoreline with three tiers of dwellings ascending uphill from the lake level. Petitioners' septic fields were "grandfathered" and did not conform to the then-current County Health Department regulations for new installations, requiring some zoning or Health Department variance for future expansions. (Tr. III, pp. 607-614) Petitioner Boltach owns seven household units – one detached single family home and three duplexes. Petitioner Williams owns a detached home.

The area was "very, very dense," mostly original cottages forty to seventy years old intended only for seasonal use, now upgraded to year-round homes. The Health Department imposed deed restrictions providing for limited use due to the severe septic problems. (Tr. VI, pp. 1402-1403) Some properties in low-lying, densely populated areas were adjacent to higher gradient properties, such as the Boltach units, and therefore subject to cross-lot septic effluent drainage towards the lakes. These septic fields provided inadequate long-term waste treatment and contaminated neighboring properties' well water. Outhouses were present, and the ground had become saturated in other areas. (Tr. I, pp. 32-55; Johnson Depo Tr. pp. 8-9; Tr. VI p. 1434).

For over ten years, the severe septic waste problems had contaminated wells with unacceptably high levels of nitrates and coliform bacteria. Residents were unable to wash laundry or flush toilets, and sewage backed up due to the high water level. In low-lying properties, these

hazards were magnified by the movement of contaminated groundwater from one lot to the next. The increased cumulative effects of these problems in "downstream" properties were confirmed by studies conducted in 1973 and 1984 by the Washtenaw County Health Department. (Tr. I, pp. 41, 50-55; Tr. IV, p. 940; Johnson Depo Tr. p. 12)

In their Brief on Appeal in the Michigan Court of Appeals, Petitioners acknowledged the following severe problems: (1) inadequacy of individual septic fields due to the high population density, the high water table, and the proximity of the lots to public waters, (2) insufficient lot size to sustain adequate drain fields and isolation distances between septic fields and wells, (3) unsuitable soil for draining, and (4) serious long- and short-term health threats to the residents, especially infants. (Petitioners' Brief on Appeal, pp. 2-3.)

Raymond Smit, a Portage Lake resident and CEO of the project's engineering firm, and an expert in the design of Michigan sewer facilities, described the inadequate septic systems, opining that septic fields in these circumstances will contaminate nearby wells and fail. (Tr. VI, pp. 1405-1407) "A septic facility in this kind of environment is a temporary expedient and it's just a question of time until it fails." (Tr. VI, pp. 1325-1326, 1434)

On the basis of recommendations from the Huron River Watershed Council, the Livingston and Washtenaw Counties Health Departments, the engineering firm, and bond counsel, Dexter Township joined Webster, Putnam, and Hamburg Townships, all of which border the lakes, to create the Portage and Base Lakes Area Water and Sewer Authority. (Tr. V, pp. 1157-1158; Johnson Depo Tr. pp. 9-12; Eisenbeiser Depo Tr. pp. 14-15; Tr. VI, pp. 1330, 1393; Drollett Depo Tr. p. 7) The project was approved by the Water and Sewer Authority, the Michigan Department

of Natural Resources (the "MDNR") and the Michigan Water Resources Commission.

The townships collectively developed special assessment districts to spread the cost equally. There was a $7,000.00 assessment upon all 411 dwelling units, whether attached or detached, and regardless of ownership. (Drollett, Tr. III, pp. 564-567, 583-585, 592, 616; Tr. VI, p. 1330; Eisenbeiser Depo Tr. pp. 12-13, 18; Knight Depo Tr. pp. 19-21)

At the hearings to confirm the special assessment roll, Petitioners appeared with counsel and objected. The Township refused to exclude these properties because of the identification of the Boltach property in the Swanson Environmental Survey as contributing to one of the area's worst plumes of contamination, the presence of nitrate levels in neighboring wells, and violations of the County Health Department standards, particularly the duplexes, which had only one drain field for two units. The County's Health Department verified all these problems to the Township as part of the Board's review. (Tr. V., pp. 1159-1161; Doug Smith Depo Tr. pp. 6, 7)

Petitioners and several others petitioned the MTT for relief from the special assessment. Six days of hearings were conducted, and exhibits and memoranda submitted. At the time of the hearing, the sewer project was approximately 66% complete. (Tr. III, 645)

Petitioners testified as laypersons as to the value of Boltach's duplexes, and offered no expert testimony addressing this issue. Petitioners' expert witness testified that, under a "discounted cash flow" approach to valuation, the duplex properties would incur a loss. The testimony included no analysis under the cost and market approaches to valuation, nor a correlation between these approaches for a final analysis. Moreover, the approach utilized by this expert resulted in five *different* value

estimates, at least one of which supported the Township's conclusion that the duplexes were benefited by the system in the amount assessed. (Tr. VII p. 1449-1593)

The MTT hearing officer found that the properties with detached homes were specially benefited by the sanitary sewer special assessment project, that the value enhancement realized by Petitioners was reasonably proportionate to the cost, and that Petitioners' lay testimony as to the properties' devaluation was unsupported by the required analysis. (Proposed Judgment, p. 11) As to the duplexes, the hearing officer found that Petitioners had improvidently relied upon valuation evidence which fell far short of the required professional appraisal standards, and had thus failed to show that the assessments were excessive or to otherwise show that the assessments were invalid. (Proposed Judgment, pp. 11-12) The hearing officer made a specific finding that the record supported the assessment of the duplexes. The MTT adopted the findings of its hearing officer, and, accordingly, denied Petitioners' request for relief.

Petitioners appealed as of right to the Michigan Court of Appeals. On March 10, 1995, the Court of Appeals issued a one-page Memorandum Opinion holding that the Tax Tribunal's factual findings were supported by competent, material, and substantial evidence on the whole record. The Court of Appeals further held that Petitioners had abandoned their constitutional claims by "affirmatively announc[ing] [before the MTT] that they would not pursue the technical [constitutional (bracketed insertion by the Court)] arguments raised in their petition" to the MTT. (PA, p. 1a) The Court of Appeals further stated that "[w]e are not convinced that a miscarriage of justice would occur were we not to rule upon these unpreserved issues." (Id.) Petitioners' subsequent motion for rehearing was denied. (PA, p. 19a)

Petitioners then filed an Application for Leave to Appeal to the Michigan Supreme Court, raising the same issues that they had raised in the Michigan Court of Appeals.

On March 29, 1996, the Michigan Supreme Court denied Petitioners' Application for Leave to Appeal. Petitioners thereupon filed a Motion for Reconsideration, raising, for the first time, their claim that they had been deprived of their Fourteenth Amendment right to due process of law as a result of the alleged failure of the Michigan Court of Appeals to consider Petitioners' constitutional arguments. The Michigan Supreme Court denied Petitioners' Motion for Reconsideration on June 18, 1996.

On September 16, 1996, Petitioners filed the instant Petition.

ARGUMENT

I. PETITIONERS' CLAIM THAT THEY WERE DEPRIVED OF THEIR FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS AS A RESULT OF THE MICHIGAN COURTS' ALLEGED FAILURE TO CONSIDER PETITIONERS' CONSTITUTIONAL CLAIMS WAS NEVER PROPERLY PRESENTED TO OR DECIDED BY THE MICHIGAN SUPREME COURT, AND THEREFORE IS NOT PROPERLY BEFORE THIS COURT.

According to Petitioners, their Petition presents only one question:

> Does a state deprive citizens of their Fourteenth Amendment right to due process when its courts affirm a local government act after repeatedly refusing citizen requests to determine whether the local government act is or is

> not unconstitutional under several clauses of both federal and state constitutions?

Although the language employed by Petitioners in framing this issue (hereinafter the "Issue" or "Issue on Appeal") is not a model of clarity, it appears that Petitioners are contending (1) that they asked one or more Michigan courts to determine whether their inclusion in a special assessment roll was constitutional under "several clauses of both federal and state constitutions;" (2) that these requests were "repeatedly refus[ed]" by these Michigan courts, and (3) that this alleged refusal deprived Petitioners of their "Fourteenth Amendment right to due process."

Notably absent from Petitioners' Petition is any evidence of compliance with Sup. Ct. R. 14(1)(g)(i), which provides that where a petition for certiorari seeks review of a state court judgment, the statement of the case must contain the following:

> [s]pecification of the stage in the proceedings, both in the court of first instance and in the appellate courts, *when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts;* and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (e.g., court opinion, ruling on exception, portion of court's charge and exception thereto, assignment of error), *so as to show that federal question was timely and properly raised and that this Court has jurisdiction* to review the judgment on a writ of certiorari.

(Emphasis added.) In fact, Petitioners did not properly raise and preserve the Issue on Appeal before the Michigan appellate courts.

Petitioners never raised the Issue on Appeal before the Michigan Court of Appeals. Nor was the Issue raised in Petitioners' Application for Leave to Appeal to the Michigan Supreme Court. Rather, the first time that Petitioners even arguably raised the Issue was in their Motion for Reconsideration filed after the Michigan Supreme Court denied Petitioners' Application for Leave to Appeal. In light of Petitioners' tardy and last-minute presentation of the Issue in the Michigan court system, which has deprived the Michigan courts of an opportunity to address the Issue in the first instance, the Issue is not properly before this Court.

According to *Cardinale* v. *Louisiana*, 394 U.S. 437, 438, 22 L.Ed.2d 398, 400 89 S. Ct. 116 (1969),

> [I]t was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions . . . The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions. . . . (Citation omitted.)

More recently, this Court stated, in *Webb* v. *Webb*, 451 U.S. 493, 496-497, 68 L.Ed. 2d 392, 397, 101 S. Ct. 1889 (1981), that:

> [i]t is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system. (Citations omitted.)

See also *Clark* v. *Jeter*, 486 U.S. 456, 459-460, 100 L.Ed.2d 465, 470-471, 108 S. Ct. 1910 (1988) ("It is our practice, when reviewing decisions by state courts, not to decide federal claims that were not 'pressed or passed upon' below." (Citation omitted.))

In this case, Petitioners' tardy and last-minute presentation of their federal constitutional claim is insufficient to preserve the issue for review by this nation's highest court. Thus, in *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 128, 89 L.Ed. 2092, 2099, 65 S. Ct. 1475 (1945), the Court held:

> Questions first presented to the highest State court on a petition for rehearing come too late for consideration here, unless the State court exerted its jurisdiction in such a way that the case could have been brought here had the questions been raised prior to the original disposition. (Citations omitted.)

See also *Hanson* v. *Denckla*, 357 U.S. 235, 243-244 n.4, 2 L.Ed.2d 1283, 1292, 78 S. Ct. 1228 (1958) (Court refused to consider a constitutional issue which was not raised "until the petition for rehearing in the Florida Supreme Court" since the question "was not seasonably presented to the Florida court"); *Board of Directors of Rotary International, supra*, 481 U.S. 537 at 549-550, 95 L.Ed.2d 474 (1987) (contentions that a California statute was unconstitutionally vague and overbroad "were not properly presented to the state courts," where the appellants "did not present the issues squarely to the state courts until they filed their petition for rehearing with the Court of Appeal.")

In the instant case, the sole issue raised by Petitioners was never presented to the Michigan courts until Petitioners filed their motion for reconsideration in the Michigan Supreme Court. As such, the Issue is not properly before this Court.

II. PETITIONERS' CLAIM THAT THEY WERE DEPRIVED OF THEIR FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS AS A RESULT OF THE ALLEGED FAILURE OF THE MICHIGAN COURTS TO CONSIDER PETITIONERS' CONSTITUTIONAL CLAIMS IS WITHOUT MERIT, BECAUSE THE RECORD DOES NOT SUPPORT THAT CLAIM.

As pointed out in the previous section of this Brief, Petitioners' "due process" claim was never presented in a timely fashion to the Michigan appellate courts, and, therefore, is not properly before this Court. Moreover, Petitioners' claim is utterly lacking in merit, and has no factual or legal support. More particularly, and as will be demonstrated in the following subsections of this Brief: (1) the record does not support Petitioners' claim that their state and federal constitutional claims were not considered by the Michigan appellate courts; and (2) even assuming, *arguendo*, that Petitioners' supposed state and federal constitutional claims were not considered on the merits by the Michigan appellate courts, such a refusal was fully justified and did not rise to a violation of Petitioners' Fourteenth Amendment right to due process.

A. Petitioners received adequate consideration of their constitutional claims in the Michigan appellate courts.

Petitioners contend that the Michigan Court of Appeals erroneously failed to consider Petitioners' constitutional claims. The record does not support this contention.

In fact, Petitioners' abandonment of their constitutional claims was addressed in the Court's March 10, 1995 Memorandum Opinion. The Court deemed Petitioners' constitutional claims "abandoned" due to Petitioners'

counsel's statement before the MTT that the "technical arguments" raised in their petition were "not being pursued at this point." The Court stated that it was "not convinced that a miscarriage of justice would occur were we not to rule upon these unpreserved issues."

Thus, contrary to the implications in the Petition, the constitutional issues were in fact briefed and argued in full, and were necessarily reviewed in order for the Court of Appeals to conclude that its holding of "abandonment" would not result in a miscarriage of justice. Moreover, the Court's Opinion can be reasonably read as a simple application of the long-standing rule that determinations on constitutional grounds are disfavored where, as here, a just result can be otherwise reached.

In a related context, the Michigan Supreme Court recently noted: "[a]n appellate court will consider claims of constitutional error for the first time on appeal *when the alleged error could have been decisive of the outcome.*" (Emphasis added.) *Michigan* v. *Grant*, 445 Mich. 535, 520 N.W.2d 123 (1994). Conversely, if the issue is *not* decisive, it need not be addressed.

In this case, the conclusion of the Court of Appeals that a miscarriage of justice would not result if it were not to rule upon Petitioners' constitutional issues indicates that a review of the issues was conducted by the Court, and that the Court concluded that a fair determination of the appeal could be reached without ruling on the constitutional issues. The Court found that the constitutional issues were not outcome-determinative, and that judicial restraint was therefore warranted.

Nor does the record does support Petitioners' claim that the Michigan Supreme Court improperly "refused" to consider Petitioners' supposed state and federal constitutional claims. Here, the Michigan Supreme Court issued

a simple one-sentence order denying Petitioners' Application for Leave to Appeal. This order did not state or imply that the Michigan Supreme Court had refused to consider any of the arguments raised by Petitioners in their Application. Rather, the Michigan Supreme Court, acting within its discretion as a court of limited jurisdiction, simply declined to grant leave to appeal to Petitioners. Such a discretionary denial of leave to appeal can no more be deemed a refusal to consider the arguments made by the applicant than this Court's one-sentence denial of a petition for certiorari can be deemed a refusal to consider the arguments made in a particular petition.

In summary, Petitioners' claim that the Michigan appellate courts refused to consider their constitutional arguments is not supported by the record.

B. Any conclusion by the Michigan appellate courts that Petitioners had not properly preserved their constitutional claims should not be disturbed by this Court.

Petitioners, focusing on the finding of the Michigan Court of Appeals that Petitioners' "constitutional issues" were "abandoned" before the MTT, seem to be arguing that this demonstrates that the Michigan Court of Appeals had refused to consider their constitutional claims. As set forth in Section A, *supra*, that is simply not the case. However, even assuming, *arguendo*, that the Michigan appellate courts did, indeed, refuse to consider Petitioners' supposed constitutional claims because they found that those claims had not been adequately preserved for appeal, those findings should not be disturbed by this Court.

While Petitioners insist that they "are not asking [this] Court to decide a simple question of fact," Petition at 17, it appears that that is exactly what Petitioners are

asking this Court to do. The Michigan Court of Appeals made a factual finding that Petitioners had abandoned certain arguments before a lower tribunal. Petitioners are now asking this Court to revisit that factual finding and to decide it differently.

Actually, Petitioners' failure to preserve their constitutional issues for appellate review constitutes an "adequate state ground" which precludes this Court's review of those issues. According to *Coleman* v. *Thompson*, 501 U.S. 722, 115 L.Ed. 2d 640, 655, 111 S. Ct. 2546 (1991),

> "[t]his Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. This rule applies whether the state law ground is substantive or procedural." (Citations omitted.)

On numerous occasions, this Court has approved a state appellate court's failure to consider federal issues where those issues were not properly presented to the appellate court. For example, in *Exxon Corp.* v. *Eagerton*, 462 U.S. 176, 181 n.3, 76 L.Ed.2d 497, 504, 103 S. Ct. 2296 (1983), this Court, in concluding that it lacked jurisdiction to consider the appellant's federal preemption claim, stated:

> The decision below does not discuss this issue, and when " 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, *unless the aggrieved party in this Court can affirmatively show the contrary.*" (Emphasis added.)

Accord, *Board of Directors of Rotary International, supra*, 481 U.S. 537 at 550, 95 L.Ed.2d 474 at 487. In this case, Petitioners have made no such showing.

Nor should this Court disturb the Michigan courts' rulings concerning Petitioners' failure to comply with the state's rules of practice. See *Herndon* v. *Georgia*, 295 U.S. 441, 443, 79 L.Ed. 1530, 1532, 55 S. Ct. 794 (1935) (Court, after noting that the Georgia Supreme Court had found that the constitutional issues raised by the appellant had not been properly preserved in accordance with "the settled rules of the state practice," held that "this determination of the state court is conclusive here"). See also *John* v. *Paullin*, 231 U.S. 583, 585, 58 L.Ed. 381, 382-383, 34 S. Ct. 178 (1913) (United States Supreme Court upheld Oklahoma Supreme Court's refusal to consider federal issues "because its appellate jurisdiction was not invoked in accordance with the laws of the State.")[1]; *Beck* v. *Washington*, 369 U.S. 541, 552-554, 8 L.Ed.2d 98, 108-109, 82 S. Ct. 955 (1962) (federal constitutional claims which the Washington Supreme Court found had not been properly preserved in accordance with state law).

Under the foregoing authorities, it would be inappropriate for this Court to second-guess the conclusion of the Michigan courts that Petitioners' constitutional claims had not been properly preserved in accordance with the requirements of state procedure.

Finally, Petitioners controvert the Court of Appeals' abandonment finding, illogically seeking to "interpret" the following statement made by Petitioners' attorney before the MTT: "And the technical arguments that we previously raised in our petition are not being pursued at

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[1] The *John* Court noted further: "Without any doubt it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law." (Citations omitted.)

this point." Petitioner's Appendix, p. 36a. In their Statement of the Case, at 4, Petitioners claim that this "statement was intended to dispose of the technical issues raised in counts 1 th[r]ough 3 of Petitioners' Amended Petition" in the MTT. Petitioners' interpretation makes no sense, however, because those counts had been dismissed by the MTT *months before* Petitioners' counsel made that statement. In other words, for this Court (or any other court) to agree with Petitioners' interpretation of that statement, the Court would have to find that the "technical arguments" referenced by Petitioners' counsel were arguments that had already been dismissed. It is certainly not surprising that the Michigan Court of Appeals found this interpretation implausible.

Thus, the sole claim raised by Petitioners in their petition for certiorari is that they have been denied due process by the alleged refusal of the Michigan appellate courts to consider Petitioners' constitutional claims. The above-cited authorities demonstrate that this Court has found, on numerous occasions, that there is no constitutional impediment – under the due process clause or any other provision of the United States Constitution – to a state court's conclusion that certain constitutional issues had not been properly preserved for appellate review. Even if this were, indeed, a case in which the Michigan courts had refused to consider certain issues because they found that the issues had not been adequately preserved, it would still be inappropriate for this Court to disturb that factual finding.

III. PETITIONERS' FEDERAL CONSTITUTIONAL CLAIMS, IF ANY, ARE UNMERITORIOUS.

In litigation stretching over the better part of a decade, Petitioners have been consistently unable to articulate any coherent federal constitutional claims. The

instant Petition suffers from the same deficiency. In short, Petitioners have been unable to articulate the precise nature of the federal constitutional arguments that Petitioners castigate the Michigan appellate courts for failing to consider.

In the following subsections of this Brief, the Township will demonstrate that Petitioners did not properly raise any federal constitutional claims before the Michigan courts. Then, Petitioners will demonstrate that even to the extent that any of Petitioners' papers filed in the Michigan courts can be read to arguably encompass something resembling a federal constitutional claim, any such claims are patently unmeritorious.

A. Petitioners did not properly raise their federal constitutional claims in the Michigan courts.

On numerous occasions, this Court has held that in order to properly present federal constitutional issues for this Court's review on appeal from a state court judgment, the federal constitutional issues must be clearly and unmistakably raised in the lower court proceedings. See *Oxley Stove Co.* v. *Butler County*, 166 U.S. 648, 654-655, 41 L.Ed. 1149, 1151-1152, 17 S. Ct. 709 (1897), in which this Court stated:

> [T]he words "specially set up or claimed" in [28 U.S.C. § 1257] . . . were inserted in order that the revisory power of this court should not extend to rights denied by the final judgment of the highest court of a State, unless the party claiming such rights plainly and distinctly indicated, before the state court disposed of the case, that they were claimed under the Constitution, treaties or statutes of the United States. . . . This statutory requirement is not met if such declaration is so general in its character that the purpose of the party to assert a Federal right is left

> to mere inference. . . . [I]t is not sufficient that it may be inferred argumentatively from the facts stated.

Many other decisions of this Court have reached similar conclusions. See, e.g., *Herndon* v. *Georgia, supra,* 295 U.S. 441 at 442-443, 79 L.Ed. 1530 at 1532 (vague reference that a statute "was in violation 'of the Constitution of the United States' " insufficient to preserve Fourteenth Amendment due process claims); *Ellis* v. *Dickson,* 349 U.S. 458, 460-462, 99 L.Ed. 1231, 1234-1235, 75 S. Ct. 850 (1955) (federal constitutional issues not properly framed by the petitioner's pleadings before the state trial court will not be considered); *Webb, supra,* 451 U.S. 493 at 496-499, 68 L.Ed.2d 392 at 397-398 (Mere reference in trial court to "full faith and credit" was insufficient to preserve a claim under the "full faith and credit" clause of the United States Constitution); *Bankers Life And Casualty Co.* v. *Crenshaw,* 486 U.S. 71, 77, 100 L.Ed.2d 62, 71, 108 S. Ct. 1645 (1988) ("vague appeal to constitutional principles does not preserve appellant's Contract Clause or due process claim. A party may not preserve a constitutional challenge by generally invoking the Constitution in state court and awaiting review in this Court to specify the constitutional provision it is relying upon").

Throughout the state court proceedings in the case, Petitioners made only vague references to any claims asserted under the United States Constitution. While Count V of Petitioners' original complaint contained a reference to the United States Constitution, there was no specific reference to the clause or clauses of the United States Constitution relied upon. Moreover, in Petitioners' Brief on Appeal to the Michigan Court of Appeals and in Petitioners' Application for Leave to Appeal to the Michigan Supreme Court, *there is not a single reference* in the tables of authorities to a single provision of the United States Constitution. As such, it is not surprising if the

Michigan appellate courts had difficulty discerning whether Petitioners had properly presented any federal constitutional claims.

Petitioners rely extensively upon their counsel's opening statement before the MTT. However, that opening statement did not contain a single specific reference to the United States Constitution. Moreover, as this Court held, in *Live Oak Water Users Assoc.* v. *Railroad Commission of California*, 269 U.S. 354, 358-359, 70 L.Ed. 305, 46 S. Ct. 149 (1926), a mere reference to the United States Constitution in oral argument is insufficient to establish that a federal constitutional claim has been properly preserved.

In summary, Petitioners did not adequately preserve any federal constitutional claims in the state court proceedings.

B. Petitioners' federal constitutional claims are unmeritorious.

Even at this late stage in the proceedings, Petitioners have been unable to articulate their alleged federal constitutional claims in a coherent fashion. However, by referencing their closing argument before the MTT, Petitioners seem to be suggesting that their constitutional issues may be discerned through an examination of that closing argument. See PA, pp. 39a-41a, as cited in Petition, p. 6. In that closing argument, however, Petitioners, citing the Equal Protection Clause of the Fourteenth Amendment, merely stated that the Township's creation of a special assessment district failed to utilize "classifications that are based on naturally distinguishing characteristics," and did not apply such classifications in such a fashion "that all members of each classification are treated similarly." Second, Petitioners arguably asserted some type of nebulous claim that their inclusion in the special assessment district constituted a deprivation of

property without just compensation, in violation of the Fifth Amendment to the United States Constitution.[2]

As the Township will demonstrate in the following subsections of this Brief, both of these "constitutional arguments" are based upon defective factual premises and lack legal merit. More specifically, as to the equal protection claim, Petitioners have not established that the Township utilized no standards, or inappropriate standards, in creating the special assessment district. Moreover, the Fifth Amendment "takings" claim, which appears to be based upon the premise that the value of Petitioners' properties was not enhanced in an amount proportionate to the tax levied, is similarly defective, because Petitioners failed to establish such disproportionality in the proofs presented before the MTT. In summary, Petitioners had a full and fair opportunity before the MTT to establish a factual predicate for their constitutional claims, but were unable to do so.

Petitioners are now challenging the factual findings of the MTT, which were affirmed by the Michigan Court of Appeals (which ruled that those findings made were "supported by competent, material, and substantial evidence on the whole record.") PA, p. 2a. The Township submits that such second-guessing of factual findings by

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[2] While their petition is by no means clear on this point, it also seems possible that Petitioners are claiming that two Michigan cases, *Dixon Road Group* v *City of Novi*, 426 Mich. 390, 395 N.W.2d 211 (1986) and *Kadzban* v *Grandville*, 442 Mich. 495, 502 N.W.2d 299 (1993), unconstitutionally require an MTT hearing officer to accord a rebuttable presumption of validity to special assessments. It suffices to say, for purposes of this Brief, that this issue was never properly presented to the MTT. Moreover, Petitioners have never cited any authority in support of the proposition that such a rebuttable presumption violates any provision of the United States Constitution.

a state administrative tribunal would be an inappropriate exercise of this Court's certiorari jurisdiction.

1. Petitioners' equal protection claim is unmeritorious.

Petitioners' apparent claim that the Township failed to adhere to any standard in creating its special assessment district is unsupported by the record. In fact, the appropriate standard can be determined by reference to the nature of the activity and to the legal background for township special assessments for sanitary sewer construction.

MCL 41.721; MSA 5.2770(51) provides that a township has the power to make improvements "and to determine that the whole or any part of the cost of an improvement shall be defrayed by special assessments against property especially benefited by the improvement." MCL 124.287(1)(a); MSA 5.2769(56) provides for the use of special assessments on property benefited by a sewage disposal system, water supply system, or a combination of systems. This is "the commonest exercise of the police power of a State or city." *Renne* v. *Waterford Township*, 73 Mich. App. 685, 690, 252 N.W.2d 842 (1977).[3]

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[3] In *Renne*, the Court of Appeals specifically deferred to the legislative finding that the potential failure of septic fields constituted a risk to health, and upheld the constitutionality of a statute which required properties within 200 feet of a sanitary sewer to be connected to that sewer, even if the property had an operable septic system. The Court held: "[I]t is beyond our province to quarrel with legislative findings on the dangers on septic tanks. . . . If the Legislature chose to nip in the bud a potential for disease transmission rather than to utilize curative measures after the fact, we decline to second-guess its decision." *Renne*, at 695-696.

The unmeritorious nature of Petitioners' claims is demonstrable through an overview of the standards governing judicial review of special assessments and property taxes. The creation of a special assessment district through the legislative powers of a municipality is presumed to be valid, and includes a presumption that the amount of the assessment and the determination of benefits by the municipality is correct and accurate. *Production Tool Supply Co.* v. *City of Roseville*, 74 Mich. App. 34, 37-38, 253 N.W.2d 350 (1977); *Crampton* v. *Royal Oak*, 362 Mich. 503, 514-516, 108 N.W.2d 16 (1961). Moreover, "[o]ne who challenges a special assessment carries a heavy burden of proof, since there is a presumption that the levy is valid." *Konfal* v. *Delhi Township*, 91 Mich. App. 147, 152, 283 N.W.2d 677 (1979). Thus, Petitioners "must at least point out either that the method of assessment adopted was all wrong or that, applying a proper method, a wrong result is apparent." *Kuick* v. *City of Grand Rapids*, 200 Mich. 582, 590, 166 N.W. 979 (1918).

Ultimately, the duty and power to determine the proper method for selecting a criterion for uniform assessments lies with the Township. The assessors are required to make the assessment within the area of the special assessment district according to a definite, uniform, and just plan. *Panfil* v. *City of Detroit*, 246 Mich. 149, 224 N.W. 616 (1929). Once this determination has been made, it carries the presumption of correctness. Its propriety, then, is evaluated by the MTT for a determination of whether the Township applied a wrong principle of valuation. *Meadowlanes Limited Dividend Housing Assoc.* v. *City of Holland*, 437 Mich. 473, 483-485, 473 N.W.2d 636 (1991).

Several formulas have been recognized for determining the allocation of costs within an assessment district. The proper rule depends upon the nature of the benefit

being assessed. See, e.g., *Carmichael* v. *Village of Beverly Hills*, 30 Mich. App. 176, 186 N.W.2d 29 (1971); *Lawrence* v. *City of Grand Rapids*, 166 Mich. 134, 131 N.W. 581 (1911).

Dexter Township carefully considered the benefits to those assessed in contrast to the costs. The preliminary draft of the special assessment district was developed by members of the Township Board, who were directly assisted and advised by professionals with the expertise necessary to develop and apply standards for determining which properties would be benefited. Industry standards were applied in order to determine the rate of flow to be generated per hookup per day. (Tr. VI, p. 1399) Prior to the development of the preliminary assessment roll, many different criteria were weighed by the Board members. (Drollett Depo Tr. p. 10; Eisenbeiser Depo Tr. p. 23-24)

Petitioners contend that the Township erred in its ultimate decision to allocate the same burden to each unit of duplexes within the district as it did to detached, single family homes. However, the allocation was factually sound, with the "per tap" charge based upon the fact that, in developed areas like Portage Lake (which will not be expanding outward), each dwelling unit contributes the same amount of wastewater to the treatment facility, and therefore receives the same benefit, regardless of whether they are free-standing or attached. (Tr. III, p. 597)[4]

Although no Michigan case specifically addresses whether a special assessment may treat individual dwelling units as the appropriate measure for apportioning a

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[4] Township Supervisor Jim Drollett was advised by bond counsel that special assessments for sewer systems, as opposed to road construction, ordinarily provided for each dwelling unit to receive a tap, and, therefore, for each unit to be assessed. (Tr. VI, p. 1425-1426, 1430)

sanitary sewer special assessment, several closely analogous situations have very recently been addressed by the Michigan courts. Those cases validate the Township's approach from a legal standpoint.

Thus, in *Brittany Park Apartments* v. *Harrison Charter Township*, 432 Mich. 798, 433 N.W.2d 161 (1989), a water and sewer rate-making case, apartment owners challenged the constitutionality of the Township's water and sewage rate-making formula (which was based upon a "per dwelling unit" charge very similar to that applied in the present case). As in this case, the plaintiffs sought to be charged for water and sewer service only by reference to the number of building structures, rather than the number of households within each structure.

The Michigan Supreme Court began its analysis with the statement that the Township had the right to impose classifications upon the users of its services so long as the classification was rationally related to a legitimate state interest, and as long as all persons within the class were treated alike. The Court emphasized that the burden remains upon the challenging party to show that the classification is "discriminatory and arbitrary" and without reasonable justification. *Id.* at 804. The Court further emphasized the advantages characteristically inuring to apartment owners from economies of scale, and concluded that the plaintiffs were simply seeking to increase their existing advantages by lowering their water and sewer rates below those paid by single-family homes. *Id.* at 810. The Court held that, although some disparity existed between the ultimate payment made per structure, the per dwelling unit formula was rational and reasonable, and the goal of uniformity was clearly met.

Similarly, in *3333 Moore's River Drive Assoc.* v. *City of Lansing*, 143 Mich. App. 253, 372 N.W.2d 523 (1985), the Court held that each condominium unit was required to

be valued separately for property tax purposes. Although *Moore's* dealt with property taxes, rather than special assessments, it thus confirmed the validity of the principle that the number of dwelling units within a structure, rather than the structure itself, is an appropriate unit of measurement for an assessment.[5]

In the present case, Petitioners failed to demonstrate any irrational classification. No evidence whatsoever was offered indicating that the amount of wastewater discharged from the individual units within each duplex

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[5] Similarly, in *City of Novi* v. *City of Detroit*, 433 Mich. 414, 446 N.W.2d 118 (1989), a challenge to water and sewage ratemaking, the Michigan Supreme Court addressed the propriety of the per dwelling unit standard for allocating water and sewer rates, deferring to the legislative judgment of the municipalities, and stating that it was "ill-equipped to deal with the complex, technical processes required to evaluate the various cost factors and various methods of weighing those factors. . . . " *Id.* at 430. The Court stated that, although a municipality is statutorily limited to charging for water and sewer "at a rate which is based on the actual cost of service," the Legislature's use of that phrase cannot be construed to mean "exactly equal the actual cost of service, in light of the difficulties inherent in the rate-making process and the statutory and practical limitations on the scope of judicial review." *Id.* at 431. The Court repeatedly acknowledged the complexity in calculating a uniform allocation of costs across populations using a given facility, the necessity of factoring in "pragmatic adjustments," and the widely accepted premise that, due to the complexities of each situation, a municipality need not be bound to any one particular formula. *Id.* at 428-429. And, crucially, the Court confirmed that the plaintiff bears the burden of proving that the rates charged are not rationally related to the services provided, and may not merely rest upon a claim that the water rates do not reflect actual mathematical costs. *Id.* at 432.

would tend to be characteristically less than would be discharged from detached homes.[6]

In summary, the record does not support Petitioners' claim that the Township applied no standard in creating the special assessment district, or that the standard employed was so unreasonable as to constitute a violation of the Equal Protection Clause.

2. Petitioners' takings claim is unmeritorious.

Petitioners' Fifth Amendment takings claim seems to be based on the premise that although they are being taxed at a rate of $7,000.00 per unit as a result of their inclusion in the special assessment district, their property values are not being enhanced in a proportionate amount as a result of the sewer construction.

Once again, the record does not support Petitioners' position, as the MTT found that "the installation of a sanitary sewer will increase property values generally (according to the Schuur analysis an average of $7000 per unit) and is probably applicable to the duplexes as well."[7] The Michigan Court of Appeals held that this finding was supported by competent, material, and substantial evidence.

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[6] Ultimately, the adopted classification is rational, based upon the type of use and occupancy, i.e., residential, as opposed to commercial, office, or industrial use. The Township and the Water and Sewer Authority have adopted separate usage rules, different rates, and a method for determining the "equivalence" between residential and commercial-industrial properties. Each residential unit, whether detached or not, can reasonably be anticipated to produce a certain relatively equivalent amount of wastewater requiring treatment. (Tr. I, pp. 82-83)

[7] In point of fact, Mr. Schuur's detailed findings supported market increases well above $7,000.00 per dwelling unit.

Substantial evidence was presented showing special tangible, and intangible, benefits to Petitioners' properties as a result of the new sewer system.[8]

Petitioners, in fact, have *conceded* that the sewer system was a "desperately needed benefit." (Petitioners' Brief on Appeal to Michigan Court of Appeals, p. 48.) In short, the septic systems were contributing to severe contamination and detriment to the health and welfare of the people and environs surrounding Portage and Base Lakes. A sewer system will provide substantial benefits, including the intangible benefits which may properly be considered as factors in determining whether and to what extent a property's value has been enhanced. The only issue raised by Petitioners is the *degree* of benefit versus cost.

"It is the Tax Tribunal's duty to determine which approaches [of determining fair market value] are useful

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[8] See, e.g., Tr. VI, p. 1343 (no future need to replace or restore septic fields); Tr. VI, p. 1345 (improved quality of lakes and neighborhoods generally). Additional benefits include the following: (1) a discontinuation of the contamination of Petitioners' subsoils and groundwater by urine, nitrates, and other pollutants as a result of the improved sewage disposal of the surrounding properties (Tr. I, p. 60); (2) easier financing for improvements (Tr. V, p. 1165); (3) prevention of the flow of effluent from the residents on higher ground into the wells of the residents below (Tr. VI, pp. 1348-1349); (4) diminution of the nitrate level of waters released into the environment to the levels required by the Michigan Department of Natural Resources; (5) greater control of the discharge of hazardous wastes, toxins, and oils into the environment; (6) gradual removal of the phosphorous from the area soils; (7) elimination of the odors which frequently attend the use of septic fields; and (8) lower long-term maintenance and repair cost than individual septic fields. (Tr. VI, pp. 1353-1357, 1386-1388).

in providing the most accurate valuation under individual circumstances of each case." *Meadowlanes, supra.* In *Meadowlanes,* the Michigan Supreme Court evaluated the valuation method adopted by the MTT and the Michigan Court of Appeals in appraising taxable property. The Court addressed whether the MTT had erred when it adopted a limited valuation approach.

> "There are three traditional methods of determining true cash value, or fair market value, which have been found acceptable and reliable by the Tax Tribunal and the courts. They are: (1) the cost-less-depreciation approach, (2) the sales-comparison or market approach, and (3) the capitalization of income approach . . . All three approaches should be used whenever possible, and an appraisal which disregards an approach by mere statements and without research justifying nonuse is considered incomplete. The values derived under the various approaches are correlated, reconciled, and weighed in order to reach a final estimate of value." *Meadowlanes, supra,* at 484-486. (Citations omitted)

Other than lay testimony, the only evidence of valuation presented by Petitioners came from real estate appraiser Henrik Schuur. For the detached homes, Schuur applied the above-described "triadic" method and received a result acceptable to the parties and to the MTT. Schuur did not apply the same methods of analysis to the duplexes but, instead, produced an analysis based only on the discounted cash flow income approach, contrary to the standards set forth by the Michigan Supreme Court. (Tr. VII, pp. 1449-1593). The MTT rejected Mr. Schuur's testimony and exhibits as to the duplexes as so "incomplete" by established professional standards that it was neither reliable nor credible. Petitioners have not come

forward with a single credible reason why this factual finding should be disturbed by this Court.

Petitioners introduced no reliable evidence to overcome the presumptions of validity as to the value of the special benefit which they received as to their properties, nor as to the amount levied.

> "As noted above, special assessments are presumed to be valid. Thus, to effectively challenge special assessments, plaintiffs, at a minimum, must present credible evidence to rebut the presumption that the assessments are valid. Without such evidence, a tax tribunal has no basis to strike down special assessments. (citations omitted) In this case, the hearing officer found that the presumption had not been rebutted . . . On this basis alone, the decision of the Tax Tribunal was correct and should be upheld." *Kadzban* v. *City of Grandville*, 442, Mich. 495, 505, 502 N.W.2d 299 (1993).

In the present case, as in *Kadzban*, the property owners failed to present reliable evidence sufficient to rebut the presumption of the validity of the special assessment. As such, Petitioners' takings claim is unsupported by the record.

CONCLUSION

For all of the foregoing reasons, the Township respectfully requests this Honorable Court to deny Petitioners' Petition for Writ of Certiorari.

Respectfully submitted,

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